INDEX

	Page
Statement	1
1. The facts	2
A. The 1940 joint operating agreement	3
(i) Background	3
(ii) The 1940 agreement	4
B. The 1965 stock acquisition	7
2. The proceedings below	8
A. The Section 1 offense	9
B. The Section 7 violation	10
C. The Section 2 violation	10
D. The judgment	11
Argument	12
I. The district court correctly held that the price-fixing, profit-pooling and market-allocation provisions of the 1940 joint operating agreement violated Section 1 of the Sherman Act	13
II. Appellants' reliance on the failing company defense is misplaced	17
III. The district court's divestiture order was proper	24
Conclusion	25

CITATIONS

Cases:	
Albrecht v. *Herald Co.*, 390 U.S. 145	16
Associated Press v. *United States*, 326 U.S. 1	16, 17
International Salt Co. v. *United States*, 332 U.S. 392	17
International Shoe Co. v. *Federal Trade Commission*, 280 U.S. 291	18, 21

319-466—68——1

Cases—Continued

	Page
Kiefer-Stewart Co. v. *Seagram & Sons*, 340 U.S. 211	14
Lorain Journal Co. v. *United States*, 342 U.S. 143	16
Northern Pac. Ry. Co. v. *United States*, 356 U.S. 1	14, 17
Northern Securities Co. v. *United States*, 193 U.S. 197	15
Timken Roller Bearing Co. v. *United States*, 341 U.S. 593	14
United States v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, affirmed, 175 U.S. 211	14
United States v. *Aluminum Co. of America*, 148 F. 2d 416	14
United States v. *Crescent Amusement Co.*, 323 U.S. 173	24
United States v. *Diebold, Inc.*, 369 U.S. 654	21
United States v. *duPont & Co.*, 366 U.S. 316	24
United States v. *General Motors Corp.*, 384 U.S. 127	14
United States v. *Line Material Co.*, 333 U.S. 287	14
United States v. *Masonite Corp.*, 316 U.S. 265	17
United States v. *Paramount Pictures*, 334 U.S. 131	15
United States v. *Sealy, Inc.*, 388 U.S. 350	14
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150	14, 15, 17
United States v. *Third National Bank*, 390 U.S. 171	21
United States v. *Trenton Potteries Co.*, 273 U.S. 392	14, 23
White Motor Co. v. *United States*, 372 U.S. 253	16

Statutes and rules:

	Page
Clayton Act, Section 7 (15 U.S.C. 18)	2, 8, 9, 10, 13, 17, 24
Sherman Act:	
Section 1 (15 U.S.C. 1)	1, 8, 9, 13, 14, 16, 17
Section 2 (15 U.S.C. 2)	2, 8, 9, 10, 17, 23
Fed. R. Civ. P. 56(d)	9

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 243

CITIZEN PUBLISHING COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of the district court in a civil antitrust action holding 1) that portions of a 1940 joint operating agreement between appellants Citizen Publishing Company and Star Publishing Company, the publishers of Tucson's only two daily newspapers of general circulation, provided for price fixing, profit pooling and market allocation in violation of Section 1 of the Sherman

Act (15 U.S.C. 1), and 2) that the acquisition of the Star by the Citizen in 1965 violated Section 7 of the Clayton Act (15 U.S.C. 18) (J.S. 32a–33a). The district court further held that appellants, by means of the 1940 joint operating agreement and the 1965 acquisition, had combined and conspired to monopolize, and had monopolized, the daily newspaper business in Tucson, in violation of Section 2 of the Sherman Act (15 U.S.C. 2) (J.S. 32a). The judgment requires divestiture of the Star and its reconstitution as an independent newspaper competitor in Tucson, calls for modification of the joint operating agreement so as to eliminate the price-fixing, profit-pooling and market-allocation provisions, and enjoins appellants from resuming such conduct after divestiture (J.S. 34a–35a).[1]

1. THE FACTS

The Arizona Daily Star ("Star") and the Tucson Daily Citizen ("Citizen") are the only daily newspapers of general circulation published in Tucson. The Star is a morning paper published seven days a week; the Citizen is an evening paper published Monday through Saturday. Each is a high-quality metropolitan newspaper with an average daily circulation of more than 42,000 copies (F. 64, 116).[2] More than

[1] The judgment has been stayed by the district court pending disposition of this appeal.

[2] "F." refers to the district court's findings of fact, set out in Appendix A to the jurisdictional statement (J.S. 1a–30a); "C.L." to the court's conclusions of law (J.S. 32a–33a); "Tr." to the trial transcript; "G.X." to government exhibits; and "D.X." to appellants' exhibits.

80 percent of their combined daily circulation is in Pima County, Arizona, which comprises the Tucson standard metropolitan area (F. 182, 183). In 1964, the combined daily circulation of the Star and the Citizen in that county was about 74,000 (F. 116); out-of-town daily newspaper circulation there was about 3,400 (F. 112). Both the Star and the Citizen are presently highly profitable business enterprises. Their combined profits in 1964, before taxes, were about $1.7 million, on revenues of about $8.7 million (F. 37).

A. THE 1940 JOINT OPERATING AGREEMENT

(i) *Background.* The Citizen, founded before 1900, is the oldest newspaper in Arizona; the Star began operations shortly after the Citizen (G.X. 15, pp. 9–10). Prior to 1940, the Star and the Citizen had vigorously competed with each other in all phases of the newspaper business. (F. 176, 178; G.X. 15, p. 87; Tr. 651, 671, 1429, 1536). Their circulation figures were about equal, but the Star sold 50 percent more advertising space than the Citizen and operated at a profit, while the Citizen sustained losses (F. 12, 13). In the years 1935 through 1939, the Star's annual profits averaged about $25,825, while the Citizen's annual losses averaged approximately $23,550 (G.X. 47).

In 1936, the stock of Citizen Publishing was purchased by William A. Small, Sr., and William H. Johnson, for $100,000, and the purchasers invested $25,000 of working capital in the paper (F. 14). Small was an experienced newspaper man, and had been a partner in a newspaper representative firm which had

served the Citizen for many years (Tr. 786–788). At the time he acquired a stock interest in the Citizen, Small was aware that the newspaper had been unprofitable since 1932, and that its losses had been defrayed by contributions from its stockholders (F. 12, 14). Between 1936 and 1939, Small increased his interest in the Citizen from 25 to 75 percent (Tr. 789, 792).

Sometime during 1936, the Star initiated discussions with the Citizen concerning the possibility of operating the two newspapers jointly (F. 16; Tr. 649, 651, 771–772). The negotiations initially were unsuccessful, but were resumed in 1939 (Tr. 791, 794), and in March 1940 the Star and the Citizen entered into a joint operating agreement (F. 17). At the time the agreement was concluded, the Citizen, despite its losses, was not on the verge of going out of business, nor was it probable that the Citizen would have done so had the agreement not been consummated (F. 14, 17).

(ii) *The 1940 agreement.* The joint operating agreement provided that each newspaper would retain its own news and editorial department as well as its corporate identity (F. 18, 26). The agreement was intended, however, to end all commercial competition between the two newspapers (F. 23, 24). It called for the formation of appellant Tucson Newspapers, Inc. ("TNI"), owned in equal shares by the Star and the Citizen, whose function would be "to manage and operate all of the departments of the publishing business of Star and Citizen (excluding the news and editorial departments * * *), and to integrate the operation of said business as much as possible" (F. 5, 18).

The production and distribution equipment of each newspaper was placed in joint ownership, and possession of these assets was transferred to TNI (F. 27, 28). Star Publishing and Citizen Publishing were each to appoint two directors for TNI; a fifth director would be selected by Citizen Publishing from three persons to be nominated by Star Publishing (F. 29).

Three provisions of the joint operating agreement are of particular importance here.

1) *Price fixing.* Pursuant to the agreement, the Star and the Citizen were sold and distributed to the public by the circulation department of TNI; commercial advertising placed in the papers was sold by the advertising department of TNI; and the subscription and advertising rates of the Star and the Citizen were set by them jointly, acting through TNI. Neither newspaper retained the power to set its own subscription or advertising rates individually (F. 19).

2) *Profit pooling.* The agreement provided that the profits realized from the publication of the newspapers would be pooled and distributed by TNI to Star Publishing and Citizen Publishing according to a specified ratio (F. 19) that favored the Star.[3] The profit-pooling provision was deemed essential to prevent a recurrence of commercial competition between

[3] It was provided that for the first ten years of operation under the agreement the Star would receive 70 percent and the Citizen 30 percent of the first $100,000 of TNI's profits, with profits in excess of that amount to be evenly divided. After ten years, the Star would receive 55 percent and the Citizen 45 percent of the first $200,000, and profits over that amount would be divided equally (G.X. 2, pp. 9-10).

319-466—68——2

the Star and the Citizen (F. 24; Tr. 778–783, 800, 2442–2443).

3) *Market allocation.* The agreement provided that Star Publishing and Citizen Publishing, as well as their stockholders, officers and executives, would not engage in any other business in Pima County in conflict with the agreement (F. 19). This provision effectively prevented the Star and the Citizen from conducting any publishing operation individually which might compete with their joint arrangement (Tr. 2449–2450; see G.X. 26).

Since 1940, the Star and the Citizen have been operated pursuant to the provisions of the agreement (F. 25). The original term of the agreement was 25 years; in 1953 it was extended until 1990. The agreement may be canceled by mutual consent of the parties (F. 20).

Before the agreement was executed, the parties had planned to increase their advertising rates after the first year of joint operation, and in fact did so (F. 38). During the five years prior to joint operation, the combined profits of the Star and the Citizen, before taxes, never exceeded 2.2 percent of revenues. In the first full year of joint operation, the combined profits rose to 10.4 percent. Since the commencement of joint operation, the combined profits of the two newspapers have never been less than 10.2 percent of revenues, and since 1959 these profits have been constant at about 20 percent of revenues (F. 35, 36). Combined revenues increased from $519,168 in 1940 to $8,654,127 in 1964; combined profits, before taxes, rose from $27,531 in 1940 to $1,727,217 in 1964 (F. 37).

B. THE 1965 STOCK ACQUISITION

At the same time that Star Publishing and Citizen Publishing concluded the joint operating agreement, their shareholders entered into a related stock option agreement which provided that if the shareholders of either corporation wished to sell their stock, the shareholders of the other corporation would have an option to purchase it (F. 47, 48). One of the purposes of this stock option agreement was to ensure appellants' control of entry into the daily newspaper business in Tucson (F. 49).

From time to time before 1964, the owners of the Star had considered a sale of the paper (Tr. 2402). In 1964, they negotiated with Robert M. White, a newspaper man from Missouri (Tr. 807, 2402–2404). The Smalls, who controlled the Citizen, met with White, who indicated he was willing to amend the joint operating agreement to give the Citizen an equal voice in the selection of TNI's directors and an equal share of the pooled profits (Tr. 2407). The Smalls thereupon agreed to waive their option and permit White to acquire the Star (D.X. 38).[4]

While the Star's negotiations with White were in progress, Brush-Moore Newspapers, Inc., publishers of a chain of papers (Tr. 801), offered $10 million for the Star (F. 50; Tr. 2414). Brush-Moore told the Smalls that "the only reason they were willing to pay

[4] It is not altogether clear how far the Star's negotiations with White progressed. Defense counsel indicated at trial that White offered $8 million for the Star (Tr. 21), but there is some suggestion in the record that the offer was not a firm one (Tr. 807).

ten million dollars for the Star [was] because they very well recognized the competitive advantage the TNI operating agreement gave them [in the choice of directors and the division of pooled profits] and they weren't about to change" the terms of the agreement to give the Citizen parity (Tr. 2413).

In order to prevent Brush-Moore from acquiring the Star, the shareholders of Citizen Publishing exercised their option and purchased the paper themselves upon the same terms as the Brush-Moore offer (F. 51; Tr. 802, 811, 2450; G.X. 15, p. 14). They did so by forming appellant Arden Publishing Co. ("Arden"), which acquired the stock of Star Publishing in January 1965 (F. 52) and its assets in March 1966, when Star Publishing was liquidated (F. 7). Arden now publishes the Star (*ibid.*).

2. THE PROCEEDINGS BELOW

The government's complaint, filed on January 4, 1965, charged that appellants had combined and conspired to restrain and to monopolize the daily newspaper business in Tucson by means of the 1940 joint operating agreement, in violation of Sections 1 and 2 of the Sherman Act; and that the proposed acquisition of the Star by the shareholders of Citizen Publishing would violate Section 7 of the Clayton Act and was also in furtherance of the unlawful combination and conspiracy. On January 5, 1965, following the district court's denial of the government's motion for a temporary restraining order, appellant Arden acquired the stock of Star Publishing. On February 2,

1965, the court, on consent of the parties, issued a preliminary injunction designed to prevent an actual consolidation of the Star and the Citizen pending a final judgment on the merits.[5]

A. THE SECTION 1 OFFENSE

Prior to trial, the government moved for summary judgment with respect to the Section 1 offense, asserting that the operating agreement in terms provided for price fixing, profit pooling and market allocation, and that these provisions were unlawful *per se*. Agreeing with the government (see J.S. 34a), the court found that the terms of the joint operating agreement were not in dispute, and, acting pursuant to F.R. Civ. P. 56(d), determined that only the question of relief remained to be decided so far as the challenged provisions of the agreement were concerned.[6] The court regarded its rulings as tantamount to granting summary judgment on the issue of Section 1 liability.

Thus, the principal issues for trial, held in April 1966, were whether appellants had conspired to monopolize the daily newspaper business in Tucson, in violation of Section 2 of the Sherman Act, and whether the acquisition of the Star by the Citizen violated Section 7 of the Clayton Act.

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[5] On March 31, 1966, the court issued an order permitting the liquidation of Star Publishing and the acquisition of its assets by Arden (F. 7). The preliminary injunction otherwise continues in effect.

[6] As formulated by the court, the only question for trial relating to this issue was: "How can modification of the 'operating agreement' be effected so as to eliminate price fixing, market allocation, and profit pooling, and yet retain to Star and Citi-

B. THE SECTION 7 VIOLATION

The district court found that Pima County, in which over 80 percent of appellants' circulation was distributed (F. 183), was the appropriate geographic market in which to appraise the competitive effects of the merger (F. 189). The court further determined that the daily newspaper business was the relevant product market (F. 60–181).

The court held that the Citizen's acquisition of the Star had the effect of continuing, in a more permanent form, the elimination of commercial competition between them which had resulted from the 1940 joint operating agreement (F. 58), and virtually foreclosed the possibility of a resumption of competition upon the expiration or cancellation of that agreement (F. 57). The court concluded that "[t]he acquisition may substantially lessen competition or tend to create a monopoly in the daily newspaper business in Tucson" (F. 59), and therefore violated Section 7 of the Clayton Act (C.L. 7).

C. THE SECTION 2 VIOLATION

The court also concluded that, pursuant to the 1940 agreement, appellants had "acquired monopoly power over the daily newspaper business in Tucson" (C.L. 3, 4), particularly with respect to circulation and advertising rates (F. 125, 181). It determined that newspapers are, in important respects, a unique news and advertising medium for which the broadcasting media

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zen, to the fullest extent possible, the benefits of joint use of staff and facilities?" Court's Statement of Issues of Fact and Issues of Law for Trial, Oct. 26, 1965, p. 2.

are not an effective substitute (F. 111, 164). Circulation figures and advertising volume of the Star and the Citizen have consistently increased, the court found, despite the growth of radio and television stations in Tucson, and despite periodic increases in subscription and advertising rates (F. 115, 120, 169, 172, 177). Finding that appellants' monopoly power, far from being thrust upon them or inevitable, was the direct result of the 1940 joint operating agreement (C.L. 3), the court concluded that appellants, "in entering into * * * [that agreement], did so with the intent and purpose of eliminating all commercial competition in the daily newspaper business in Tucson" (C.L. 4), and that they had thus combined and conspired to monopolize, and had monopolized, the daily newspaper business in Tucson, in violation of Section 2 of the Sherman Act (C.L. 3, 6).

D. THE JUDGMENT

The decree of the district court requires appellants to submit a plan for divestiture and reestablishment of the Star as an independent competitor, and for modification of the joint operating agreement to eliminate the unlawful price-fixing, market-allocation, and profit-pooling provisions. The decree does not, however, prohibit other forms of joint operation (see J.S. 35a).[7]

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[7] The court found that "[t]he printing and distribution of Star and Citizen through joint use of substantially the same mechanical equipment does not depend upon the continuation of the price fixing, profit pooling, and market allocation agreements" (F. 190), and ruled only that "[p]laintiff is entitled to a decree directing * * * modification of the operating agreement" (C.L. 8), not its complete abrogation.

ARGUMENT

Appellants' principal argument is directed toward that part of the district court's judgment which holds that the provisions of the 1940 joint operating agreement providing for "price fixing, profit pooling, and market allocations * * * are illegal *per se* under Section 1 of the Sherman Act," and which requires that the agreement be modified to eliminate those provisions (J.S. 34a-35a). Appellants apparently do not challenge the court's determination that the joint operating agreement "provides for price fixing, profit pooling, and market allocations." Rather, they contend that the entire arrangement was justified because the Citizen was on the verge of going out of business in 1940, and, therefore, that the provisions should have been upheld as reasonable restraints of trade and should be permitted to continue after divestiture, even though the Star and the Citizen admittedly are now highly profitable business enterprises.

This Court has repeatedly held, however, that agreements between competitors which embody *per se* violations of the Sherman Act cannot be justified by the claim that they are necessary to relieve the parties from the effects of vigorous competition. While the district court did not foreclose appellants from attempting to realize economies through lawful joint action (such as the use here of joint production and distribution facilities), it correctly held that the other means chosen here were impermissible and must be discontinued. Moreover, since the court below found, contrary to appellants' assertion, that Citizen Publishing

was not on the verge of going out of business in 1940 (F. 17), a finding supported by substantial evidence, this effectively disposes of the premise upon which appellants' "failing company" argument is grounded.

Appellants do not contest the court's ruling that the acquisition of the Star by the Citizen in 1965 was unlawful under Section 7 of the Clayton Act. Nor do they deny that divestiture constitutes an appropriate remedy. They assert, however, that the decree "should be modified to permit divestiture of either the Citizen or the Star interest" (J.S. 8). Appellants do not elaborate any reasons in support of this contention or demonstrate that the relief decreed by the district court—a matter committed to that court's sound discretion—was improper.

Accordingly, this case involves basically only the application of settled Sherman Act principles to the particular facts and therefore does not warrant plenary consideration.

I. THE DISTRICT COURT CORRECTLY HELD THAT THE PRICE-FIXING, PROFIT-POOLING AND MARKET-ALLOCATION PROVISIONS OF THE 1940 JOINT OPERATING AGREEMENT VIOLATED SECTION 1 OF THE SHERMAN ACT

1. As noted, appellants do not challenge the district court's conclusion that the 1940 agreement between the Star and the Citizen provided for joint determination of advertising and subscription rates and pooling of profits through the medium of TNI, and that it required the parties to refrain from engaging in any publishing venture in Pima County which conflicted with their joint arrangement (F. 19). The court

properly ruled that these provisions constituted price fixing, profit pooling and market allocation.[8]

2. The district court correctly held that these provisions of the joint operating agreement were unlawful *per se* under Section 1 of the Sherman Act (C.L. 2). Agreements to eliminate price competition between competitors long have been recognized as unlawful *per se*.[9] Market-allocation arrangements have similarly been held inherently illegal.[10] Under the joint operating agreement, the subscription and advertising rates of the Star and the Citizen are established jointly by them, acting through TNI. Another provision of the agreement effectively prevented either newspaper from conducting another publishing operation which would compete with this joint arrangement. Thus, the agreement on its face entailed price fixing and market allocation.

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[8] At trial, the principals to the operating agreement conceded that its purpose was to end commercial competition between the Star and the Citizen (Tr. 784, 810–811; see F. 23, 24).

[9] *United States* v. *Trenton Potteries Co.*, 273 U.S. 392; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 218; *United States* v. *Line Material Co.*, 333 U.S. 287, 307 and n. 21; *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211, 213; *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 5; *United States* v. *General Motors Corp.*, 384 U.S. 127, 147; *United States* v. *Sealy, Inc.*, 388 U.S. 350, 355.

[10] *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (C.A. 6), affirmed, 175 U.S. 211; *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 427 (C.A. 2); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593. Appellants, in their jurisdictional statement, do not challenge the district court's conclusion that the market-allocation provision of the 1940 agreement is unlawful *per se*.

Moreover, the allocation of profits to the Star and the Citizen was not based upon the economic performance of each newspaper; it did not turn upon their respective circulation or advertising. Such allocation could serve only to eliminate the incentive of each newspaper to maximize its own earnings at the expense of its rival through independent business initiative. Indeed, the owners of the two newspapers conceded that the distribution of pooled profits according to a fixed percentage was designed to prevent a recurrence of preexisting competition between the two papers (Tr. 782, 800).[11] As the Star's business manager in 1940 testified, if revenues had not been divided on a predetermined basis, "it would have just been as competitive as it was before and that's exactly what we were trying to avoid" (Tr. 664).[12] Agreements that have the purpose and effect of "stabilizing" prices are just as unlawful *per se* as those that directly fix prices. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223. Here the profit-pooling

[11] Of profit pooling between competitors, this Court has stated: "Clearer restraints of trade are difficult to imagine." *United States* v. *Paramount Pictures*, 334 U.S. 131, 149. In *Northern Securities Co.* v. *United States*, 193 U.S. 197, 328, this Court, in striking down an arrangement which placed two competing railroads under the control of a holding company, expressly approved a finding of the lower court that the combination "destroy[s] every motive for competition between [the railroads] * * * by pooling the earnings of the two roads for the common benefit of the stockholders of both companies."

[12] The district court found that "[i]t was in furtherance of their intent to eliminate competition between Star and Citizen that the parties inserted a profit pooling provision in the operating agreement" (F. 24).

provision supported and effectuated the price-fixing arrangement, and is illegal because it is a "restrictive practice * * * ancillary to the price-fixing scheme." *White Motor Co.* v. *United States,* 372 U.S. 253, 260.

3. The issue here is not the legality of *all* joint operating agreements, or, indeed, of all aspects of appellants' agreement. The government challenged, and the district court found unlawful, only certain portions of the 1940 agreement. Unlike the situation in *White Motor Co.* v. *United States,* 372 U.S. 253, the price-fixing and profit-pooling provisions here involved do not constitute arrangements of first impression, but are practices which have long been familiar to the courts and have consistently been held unlawful *per se.* Nor is there room for doubt that the established principles of Sherman Act construction are fully applicable to the business activities of newspapers.[13] Thus, the district court's summary disposition of the Section 1 violation, which turned simply on the court's interpretation of the 1940 agreement, and the application thereto of established Sherman Act principles, was

[13] Newspaper publishers "are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want. * * * All are alike covered by the Sherman Act." *Associated Press* v. *United States,* 326 U.S. 1, 7; see also *Lorain Journal Co.* v. *United States,* 342 U.S. 143; *Albrecht* v. *Herald Co.,* 390 U.S. 145. Contrary to appellants' suggestion, the First Amendment affords newspaper publishers no immunity from the application of the antitrust laws to their business activities. *Lorain Journal Co., supra,* 342 U.S. at 155–156; *Associated Press, supra,* 326 U.S. at 19–20.

plainly proper. *Associated Press* v. *United States*, 326 U.S. 1.[14]

II. APPELLANTS' RELIANCE ON THE FAILING COMPANY DEFENSE IS MISPLACED

A remaining question involves whether appellants' contention that the offending provisions of the joint operating agreement were necessary in 1940 to preserve a failing company serves to undermine the district court's holding of *per se* illegality. If the joint operating agreement had provided only for the fixing of prices and pooling of profits by the two newspapers, there could be no question that those provisions would have violated Section 1 of the Sherman Act. Such agreements between competitors are unlawful *per se*, and are not saved by pleas that they are necessary to shield the participants from the rigors of commercial competition. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-221; *United States* v. *Masonite Corp.*, 316 U.S. 265, 276.

Appellants point out, however, that the 1940 agreement was not limited to price fixing and profit pooling; it also resulted in a consolidation of production, distribution and other business activities. Appellants thus

[14] Summary judgment is not a novel procedure in antitrust cases. See, *e.g.*, *International Salt Co.* v. *United States*, 332 U.S. 392; *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1. Moreover, summary disposition of the Section 1 charge here did not end the case, and appellants were able to present virtually all the evidence they deemed relevant at the trial of the Section 7 and Section 2 issues and on the question of relief (J.S. 6). Appellants do not suggest that their attempted defense of the joint operating agreement was prejudiced by the exclusion of material evidence from the record.

describe the agreement as a "partial merger" of the two newspapers, and urge that the legality of the arrangement should be tested not under the *per se* rules of the Sherman Act but by the standards generally applicable to corporate mergers under the Clayton Act. Specifically, appellants contend that in 1940 the Citizen was a "failing company" and that the entire joint operating agreement is protected by the failing company defense available in merger cases under *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291.

We think this argument is unsound for two reasons. First, the failing company defense is not available to save appellants' 1940 agreement because critical elements of that defense were lacking. Second, the 1940 agreement was significantly different from a merger and cannot appropriately be tested by the same standards.

1. The failing company defense cannot save appellants' arrangement, since essential elements of that defense did not exist when the 1940 agreement was consummated. Although the defense may be invoked by a corporation facing "the grave probability of a business failure" (*International Shoe Co., supra,* 280 U.S. at 302), the findings of the district court make it clear that the Citizen in 1940 did not meet that description. The court stated (F. 17):

> At the time Star Publishing and Citizen Publishing entered into the operating agreement, and at the time the agreement became effective, Citizen Publishing was not then on the verge of going out of business, nor was there a serious

> probability at that time that Citizen Publishing would terminate its business and liquidate its assets unless Star Publishing entered into the operating agreement.

The evidence amply supports the finding. Small, who acquired a 25-percent interest in the Citizen in 1936 (F. 14), had had considerable newspaper experience and had previous contact with the Citizen (Tr. 785–788).[15] By 1936, when Small acquired an interest in the Citizen, he was quite familiar with its history and its operations as well as its "financial condition" (F. 14).

Between 1936 and 1939, Small sought to interest three of his personal acquaintances in investing some money in the Citizen, but they were not prepared to do so at that time (Tr. 797–799). Small proceeded to increase his own interest in the Citizen, and by 1939 he held 75 percent of the company's stock (F. 14). The court found that "in 1939 [Small] moved to Tucson, being prepared to finance the losses of Citizen Publishing for some little time thereafter from resources available to him other than the earnings or assets of Citizen Publishing" (F. 14).[16]

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[15] In 1917 he joined a Chicago newspaper representative firm which performed services for the Citizen (Tr. 785–788). In 1926 Small became a partner in the firm; in 1933 the firm resumed its representation of the Citizen, and Small became a good friend of the paper's owner (*ibid.*).

[16] The district court observed that "Small was prepared to carry this for a while if he had to and see if he couldn't better the situation" and that "[y]ou have a different picture with the addition of that man who has entered into this thing recently and is prepared to go on" (Transcript of Proceedings, February 15, 1967, p. 362).

While recognizing that the Citizen had been losing money, the district court determined that the paper's new owner was prepared to continue efforts to improve its financial condition.[17] The Star apparently shared this view as to the Citizen's possible future vitality, for it was the Star, not the Citizen, which initiated the discussions culminating in the joint operating agreement. Thus, it appears that the Star's owners thought that the Citizen, either in the hands of Small or under a possible new owner, might pose a significant threat to its own competitive position. Otherwise, it is difficult to explain the Star's willingness to enter into an agreement to share what would have been, were the Citizen actually in grave danger of failing, its own imminent monopoly profits that could be anticipated because its competitor was presumably headed for extinction.

Moreover, it is apparent that the Citizen failed to explore means for improving its condition other than ending all commercial competition with the Star. The testimony of Small shows that he made no effort to sell the Citizen to an outside party under whose management competition with the Star might have been preserved, but sought only to interest a few of his acquaintances in an investment opportunity (Tr. 797–

[17] Appellants suggest that in March 1940, when the joint operating agreement was signed, Small "no longer had the desire to continue carrying Citizen's deficit" (J.S. 12). We assume that appellants mean only that Small preferred to join forces with the Star. Nothing in the record shows that Small would have discontinued his efforts to strengthen the Citizen had the Star not been willing to enter into the joint operating agreement, and the court expressly found to the contrary (F. 17).

799). In addition, various steps could have been taken to reduce the Citizen's expenses without eliminating all commercial competition between it and the Star. Indeed, some such steps were incorporated in the unchallenged part of the joint operating agreement. But no alternative of a less anti-competitive nature than the joint agreement, with its price-fixing, market allocation and profit-pooling provisions, was apparently even considered, much less tried, in 1940. It is established that the failing company defense is unavailable where, as here, less anti-competitive steps were available but were neither explored nor attempted. See *International Shoe Co., supra,* 280 U.S. at 301–302; *United States* v. *Diebold, Inc.,* 369 U.S. 654; cf. *United States* v. *Third National Bank,* 390 U.S. 171, 189–192.

2. In any event, appellants' overall arrangement, consisting of separable provisions for joint production and for elimination of commercial competition, differs significantly from a merger.

Price-fixing agreements between competitors are deemed unlawful *per se* principally because they commonly serve no purpose except the elimination of competition. Mergers between competitors, however, are more complex transactions, and may serve a variety of legitimate purposes, depending on the industry involved, such as a beneficial restructuring of the assets of the merging firms and the stimulation of business initiative and investment. Moreover, the economic benefits and competitive detriments of a given merger are not susceptible of discrete treatment, since each is

an aspect of the same unitary transaction. For these and similar reasons, it has been deemed inappropriate to apply a *per se* rule to mergers. Instead, each such transaction is examined with a view to determining whether it may tend substantially to lessen competition. The viability of the merging companies bears directly on that inquiry, as the failing company defense appropriately recognizes.

Unlike an actual merger, a joint operating agreement like the one between the Star and the Citizen allows the realization of the benefits of operating economies without requiring the toleration of all anti-competitive effects, since the arrangement can be limited to the joint use of production and distribution facilities, without any necessity for the inclusion of price-fixing and related provisions. Because such a separation of benefits and detriments is possible, there is no more reason to permit a price-fixing agreement when it is accompanied by an agreement for joint operation of facilities than there is to permit such an agreement standing alone. Moreover, a merger may clear the way for new entry into the market, whereas the anti-competitive provisions of the agreement here involved would not have such effects.

Appellants do not suggest that the price-fixing and profit-pooling provisions of the 1940 agreement were necessary incidents of their joint operation. The joint operation of facilities is not under attack here, and, indeed, the district court expressly found that joint production and distribution of the Star and the Citizen "does not depend upon the continuation of the price

fixing [and] profit pooling * * * agreements" (F. 190). Rather, appellants contend that price fixing and profit pooling were required, quite apart from joint production and distribution, because the Star and the Citizen needed the increased profits which the elimination of commercial competition between them would make possible; in fact, this was their purpose in entering into the 1940 agreement (F. 23, 24).

Thus, appellants' argument amounts to a plea that claims of business necessity can justify *per se* violations of the Sherman Act. Guided by considerations bearing on effective antitrust enforcement, this Court (see *United States* v. *Trenton Potteries Co.*, 273 U.S. 392) has repeatedly declined to entertain such pleas in the past. No reason exists why it should apply a different approach here.[18]

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[18] Appellants also challenge the district court's determination that the joint operating agreement resulted in their acquisition of monopoly power in violation of Section 2 of the Sherman Act (C.L. 3). They assert that "[t]here is today no city in this country the size of Tucson which can or does support two metropolitan newspapers operating independently at both the commercial and journalistic levels" (J.S. 12). But the very exhibit relied on by appellants (D.X. 63a) refutes this claim. It shows that, in 1965, 23 cities smaller than Tucson and 19 cities larger than Tucson had two or more competing daily newspapers not operated under a joint production plan. Tucson's present population range is 200,000–300,000 (J.S. 10); some nine cities in the 100,000–400,000 population range have newspapers which compete commercially. Moreover, the court's conclusion that appellants had violated Section 2 was reached only after trial and on the basis of extensive findings of fact which amply support that determination (see *supra*, pp. 10–11).

III. THE DISTRICT COURT'S DIVESTITURE ORDER WAS PROPER

The district court found that the Citizen's acquisition of the Star in 1965 violated Section 7 of the Clayton Act and ordered divestiture of the Star.[19] Appellants were directed to submit a plan of divestiture which will provide "for the continuation of The Arizona Daily Star under ownership wholly free from any interests of or control by" appellants (J.S. 35a). Coupled with the elimination of the unlawful provisions of the joint operating agreement, the divestiture order is designed to restore newspaper competition in Tucson.

Appellants concede that the acquisition of the Star violated Section 7 and that divestiture constitutes appropriate relief. They contend, however, "that the order should be modified to permit divestiture of either the Citizen or the Star interest" (J.S. 8).

Divestiture of the acquired enterprise is the customary form of relief in Section 7 cases (*United States* v. *duPont & Co.*, 366 U.S. 316, 328), for less stringent measures ordinarily will not effectively redress the violation. Appellants have not shown that the district court abused its broad discretion in granting relief (*United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 185) when it here followed the usual practice of requiring the complete separation of companies whose merger violated Section 7.

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[19] Since Arden now owns the assets of Star Publishing, the court authorized divestiture either by a sale of Star's assets or by a sale of all of Arden's stock (J.S. 34a–35a).

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted.

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